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Supreme Court, U.S.
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08-182

IN THE
Supreme Court of the United States

CANYON COUNTY,

Petitioner,

v.

SYNGENTA SEEDS, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Does a municipal government's provision of law enforcement and health care services satisfy the civil standing requirement that a plaintiff be "injured in his business or property" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c)?

2. May a court dismiss a civil RICO complaint for lack of proximate causation where a municipality alleges that employers of unauthorized workers are liable for increased costs of providing law enforcement and health care services?

RULE 14.1(B) STATEMENT

Petitioner's "List of Parties" (Pet. ii) is accurate.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, each of the respondents states the following:

Syngenta Seeds, Inc. states that it is a wholly owned subsidiary of Syngenta Corporation, which is wholly owned by Syngenta, A.G., a Swiss corporation. Syngenta, A.G.'s shares are publicly traded on the Swiss stock exchange, with American repository receipts traded on the New York Stock Exchange.

Sorrento Lactalis, Inc. states that it is owned by parent company Lactalis American Group, Inc., a Delaware corporation, which holds 100 percent of the stock of Sorrento Lactalis, Inc. Lactalis American Group, Inc. is owned by B.S.A., a French société anonyme, which is a privately-traded corporation. No publicly-traded company owns 10 percent or more of Lactalis American Group, Inc.'s stock.

Swift Beef Company states that it is a wholly-owned subsidiary of Swift & Company, which is in turn a wholly-owned subsidiary of S&C Holdco 3, Inc., a privately held Delaware corporation.

Harris Moran Seed Company states that it is a California corporation and is not a publicly held corporation or other publicly-held entity. Harris Moran Seed Company has a parent corporation, Vilmorin USA Corp., which owns a controlling number of shares of the Harris Moran Seed Company corporation. No publicly held corporation owns 10 percent or more of Harris Moran Company's stock, although both non-publicly traded Vilmorin USA Corp., a Delaware corporation, and Hazera Quality Seeds, Inc., an Israeli

corporation, each own in excess of 10 percent of the Harris Moran Company shares outstanding. Vilmorin & Cie., a French, publicly-traded corporation, owns a controlling number of shares in Vilmorin USA Corp. Groupe Limagrain, a French co-operative organization that is not publicly traded, owns a controlling interest in Vilmorin & Cie.

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STATUTORY PROVISIONS

Section 1961(4) of Title 18 to the United States Code provides that:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity ....

Section 1962(c) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1964(c) of Title 18 to the United States Code provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee ....

STATEMENT OF THE CASE

This case arises from a novel effort by Canyon County, Idaho to twist civil RICO beyond recognition. Petitioner sued the respondents under RICO to recover for an alleged "injury" which no court has ever permitted a municipality to recover: providing municipal government services (here, law enforcement and health care services).

1. Petitioner sued four of the County's largest private employers: Syngenta Seeds, Inc.; Sorrento Lactalis, Inc.; Swift Beef Company; and Harris Moran Seed Co. (collectively, the "respondent corporations"). In a complaint devoid of factual detail, petitioner alleged each respondent corporation formed a separate association-in-fact RICO enterprise by conspiring with a temporary staffing agency to employ and harbor employees who were unauthorized to work in the United States. Pet. App. 74a-82a. Petitioner cursorily claimed that as a result of such unlawful employment, "it has been forced to spend money to provide medical and criminal justice services for many of these illegal immigrants." *Id.* at 78a. *See also id.* at 81a.

Petitioner also sued Albert Pacheco, the former Executive Director of the Idaho Migrant Council, a non-profit charity that "provides services to needy persons." Pet. App. 82a. Petitioner alleged that Mr. Pacheco set for the charity a policy of willful blindness to the possibility that "many of the [charity] recipients are illegal immigrants using false identity documents." *Id.* at 83a. With the charity's help, many of these recipients allegedly obtained public medical assistance and housing provided by another charity. *Id.* at 83a-85a. Petitioner alleged that "these illegal immigrants have cost Canyon County money by seeking public assistance from the County ... and by burdening the County's criminal justice system when they commit crimes." *Id.* at 85a.

2. Respondents moved to dismiss the complaint on several grounds. First, they argued that petitioner's claims fail because the costs of providing governmental services are not an injury to "business or property" as required by RICO. Respondents relied in part on the common law's municipal cost recovery rule, which prohibits local governments from recovering in tort for providing government services. *See City of Flagstaff v. Atchison, Topeka & Santa Fe Ry.*, 719 F.2d 322 (9th Cir. 1983) (Kennedy, J.). Second, respondents argued that petitioner failed to satisfy RICO's proximate

cause requirement because petitioner's alleged injuries—the provision of government law enforcement and health care services—lack any connection to the alleged RICO violations, which related to the respondent corporations' employment practices. Third, respondents argued that petitioner failed to allege a legally sufficient RICO "enterprise," an indispensable element of a RICO claim. Fourth, respondents maintained that the complaint failed to allege the requisite elements of any RICO predicate act.

The district court dismissed the complaint, holding that petitioner's allegations of increased expenditures for law enforcement and health care services did not constitute an injury to business or property under RICO. Pet. App. 67a. The court relied upon the common law's municipal cost recovery rule, which generally prohibits a local government from recovering in tort for providing municipal services. *Id.* at 55a-66a.

3. A unanimous panel of the Ninth Circuit affirmed. The Ninth Circuit based its ruling on two principal alternative grounds. *First*, it held that the County lacked standing to bring a RICO claim because a municipality's decision to provide government services does not constitute an injury to its "business or property." *Second*, the Ninth Circuit held that even if petitioner's alleged injury was cognizable under RICO, petitioner still lacked standing because it failed to allege proximate causation. It applied this Court's decision in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and reasoned in part that "just as in *Anza*, the cause of the plaintiff's asserted harms is a set of actions (increased demand by people within Canyon County for public health care and law enforcement services) entirely distinct from the alleged RICO violation (the defendants' knowing hiring of undocumented workers)." Pet. App. 41a.

REASONS FOR DENYING THE WRIT

The petition is not worthy of the Court's review. No circuit split exists, and the Ninth Circuit provided two independent grounds for its affirmance of the dismissal of petitioner's complaint. Neither of those alternative grounds—much less both—warrant this Court's attention.

The Ninth Circuit held that petitioner's provision of governmental services is not an injury to business or property. Petitioner claims a circuit split on this issue (Pet. 14), but none exists. Petitioner misreads the Ninth Circuit's decision below as imposing a "commercial injury" requirement based upon an analogy to the identical language in the Clayton Act. The Ninth Circuit, however, held that petitioner's claims fail no matter how one interprets RICO's injury to business or property requirement—whether by reference to its plain meaning, state property law, or this Court's Clayton Act precedents. In any event, this case is a poor vehicle to examine these issues: Petitioner conceded below that the general common law ban on municipal cost recovery applied to RICO and also conceded that RICO's standing requirements should be similar to the Clayton Act's requirements.

Even if petitioner was correct that its purported government services injury constituted an injury to business or property (which it does not), the Ninth Circuit's decision also rests independently on petitioner's failure and inability to plead proximate causation. Petitioner wrongly contends that this Court's cases hold that any non-derivative injury is compensable under RICO. Pet. 19-21. Instead, the Ninth Circuit's ruling is a faithful and fact-bound application of this Court's ruling in *Anza*. Petitioner's theory of harm—with a lengthy causal chain and numerous intervening causes—satisfies no theory of causation that could be deemed *proximate*.

I. THE ISSUE OF WHETHER PETITIONER ALLEGED AN INJURY TO ITS BUSINESS OR PROPERTY DOES NOT WARRANT REVIEW.

To bring a civil action under RICO, a plaintiff must allege that he has been "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Petitioner seeks review of the Ninth Circuit's holding that a municipality is not injured in its business or property when it provides law enforcement services and health care programs. In urging review, however, petitioner misstates the holding below and those of other circuit courts. No circuit court has held that a municipality's provision of governmental services provides that government a right to recover treble damages under RICO.

A. The Ninth Circuit Correctly Concluded That a Municipality Does Not Suffer an Injury to Its Business or Property When It Provides Governmental Services.

In its complaint, petitioner alleged that it was injured "because it has paid millions of dollars for health care services and criminal justice services for the illegal immigrants who have been employed by the defendants in violation of federal law." Pet. App. 72a. Petitioner maintains that the Ninth Circuit affirmed the dismissal of its complaints "primarily because it found nothing in the legislative history of RICO to indicate Congress intended for this type of claim to be asserted." Pet. 8. That, however, is not a fair reading of the decision below. The Ninth Circuit did not base its conclusion primarily on the legislative history of RICO. Rather, it held that under *any* meaning of the "business or property" injury requirement, petitioner's provision of governmental services does not qualify.

First, the court correctly observed that "the ordinary meaning of the term 'property' does not include the interests of local governments in performing functions such as

policing, caring for the indigent sick, and otherwise protecting the well-being of the public." Pet. App. 23a. Property generally refers to things that are owned or possessed—not, as here, government programs that a municipality elects to offer. *See Webster's 3d New Internat'l. Dictionary* 1818 (3d ed. 1969) (defining property as "something that is or may be owned or possessed"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979) (giving same meaning to identical term in the Clayton Act). Moreover, one does not commonly refer to government as being injured in its property when it decides to provide public services. See Pet. App. 22a (finding "it particularly inappropriate to label a government entity 'injured in its property'" under these circumstances).[1]

Second, the Ninth Circuit considered whether petitioner had a property interest at stake by looking to state property law. Pet. App. 23a-24a. *See Diaz v. Gates*, 420 F.3d 897, 899 (9th Cir. 2005) (en banc) (in interpreting § 1964(c), courts "typically look to state law to determine whether a particular interest amounts to property" (internal quotation marks omitted)), *cert. denied sub nom.*, *Parks v. Diaz*, 546 U.S.

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[1] Here, a government entity made a policy choice to provide the law enforcement and health care services at issue. For example, with respect to the indigent health care services at issue, petitioner has intentionally avoided the issue of whether it was required to provide those services under Idaho law. Either way it was not "injured." If the County was obligated to pay certain medical costs for illegal immigrants (because the state chose to require such expenditures under medical indigency laws), then the County suffered no "injury"—it merely followed a state policy choice. If, however, Canyon County chose to provide those medical services even though state law did not obligate it to do so, that decision is a local government policy choice—not an injury to business or property. *See City of Flagstaff*, 719 F.2d at 324 (Kennedy, J.) ("If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns.").

1131 (2006); *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir. 1992) ("While federal law governs most issues under RICO, whether a particular interest amounts to property is quintessentially a question of state law."). The court, however, found "no indication that Idaho law creates a property-like entitlement in such [governmental] services on the part of counties." Pet. App. 23a. As noted by the district court, Idaho case law "strongly suggest[s] that a non-contractual interest in reimbursement for governmental services is not a recognized property right." *Id.* at 59a n.6 (citing *City of Grangeville v. Haskin*, 777 P.2d 1208, 1211-12 (Idaho 1989) (holding that Idaho law did not permit a city to collect charges for water, sewer, and garbage services from residents who had not contracted for such services)).

Third, consistent with the parties' briefing, the Ninth Circuit drew support from this Court's jurisprudence regarding the Clayton Act's analogous civil enforcement provisions. Pet. App. 20a-21a, 24a-28a. The Supreme Court has "repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267 (1992) (citation omitted).[2] Section

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[2] In *Holmes*, this Court applied the Clayton Act's requirement of proximate causation to civil RICO actions, reasoning that

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

503 U.S. at 268 (citation omitted). *See also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150-51 (1987) (noting the Clayton Act offered the "closest analogy to civil RICO" in part because "both statutes aim to compensate the same type of injury"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985) (analyzing the legislative *(continued)*

4 of the Clayton Act provides a private right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. *See also id.* § 15(a) (permitting the federal government to recover when it suffers the same injury). In *Hawaii v. Standard Oil Co. of California*, this Court affirmed dismissal of Hawaii's Clayton Act claims to recover for injuries to the State's economy (brought in the State's *parens patriae* capacity). 405 U.S. 251, 265 (1972). The Ninth Circuit observed below that this Court held that the Clayton Act "'does not authorize recovery for economic injuries to the sovereign interests of a State.'" Pet. App. 26a (quoting *Hawaii*, 405 U.S. at 265). Such a limitation—drawn from an interpretation of identical language in the Clayton Act—provided further confirmation of the holding below.

Fourth, the Ninth Circuit explained below that "the common law doctrine barring government recovery of the costs of public safety services in tort supports our holding." Pet. App. 31a. The so-called municipal cost recovery bar holds that a municipality cannot recover from private parties the costs of providing government services, irrespective of the underlying theory of liability. *See City of Flagstaff*, 719 F.2d at 324 (Kennedy, J.). For instance, in *District of Columbia v. Air Florida, Inc.*, the D.C. Circuit rejected the District of Columbia's claim for the costs of emergency services incurred when defendant's airplane crashed. 750 F.2d 1077 (D.C. Cir. 1984). It reasoned that "[t]he general common-law rule in force in other jurisdictions" provides that "'the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.'" *Id.* at 1080 (quoting *City of Flagstaff*, 719 F.2d at 323). Below, the Ninth Circuit correctly looked to these precedents

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history of the RICO Act and finding that "[t]he clearest current in that history is the reliance on the Clayton Act model.").

to find support for its conclusion that petitioner does not suffer a compensable *injury* when it makes a decision to provide governmental services. Although petitioner asserts that reliance on these precedents amounted to an impermissible rewriting of RICO (Pet. 11-13), the Ninth Circuit was simply doing what this Court has instructed: looking to the common law meaning of "injured" when interpreting that same word in RICO. *See Beck v. Prupis*, 529 U.S. 494, 504 (2000) ("Congress meant to incorporate common-law principles when it adopted RICO."); *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2140 (2008) (noting the general "presumption that Congress intends to adopt the settled meaning of common-law terms" in RICO).

B. Petitioner Conceded Below the Legal Points It Now Disputes.

Petitioner complains that the Ninth Circuit "construed 'business or property' in § 1964(c) in the same manner as in the Clayton Antitrust Act." Pet. 14. Petitioner, however, is the party that urged the Ninth Circuit to do so. In its opening appellate brief, petitioner wrote that § 1964(c) of RICO is "to be interpreted in tandem with § 4 of the Clayton Antitrust Act, upon which it was based." Appellant's Br. at 7 (9th Cir. 2008) (No. 06-35112).

Likewise, before the district court, petitioner did not dispute the application of the municipal cost recovery rule to this case. As the district court explained, petitioner "appears to concede the existence of the municipal cost recovery rule." Pet. App. 55a. As a result, the district court analyzed whether one of the two common law exceptions to the rule applied. *Id.* at 55a-66a. Petitioner cannot reverse course now on legal issues it conceded below.

C. No Circuit Split Exists.

Petitioner alleges a 2-2 circuit split over "whether the phrase 'business or property' [in § 1964(c)] requires an antitrust injury." Pet. 14. No such split exists.

Contrary to petitioner's claim (Pet. 14-15), the Ninth Circuit never held that a RICO plaintiff must allege an "antitrust injury" or a "competitive injury." Rather, that court held only that the mere fact that a municipality alleges that "it has spent money in order to act governmentally" does not mean that it has suffered an "injury to property." Pet. App. 21a.[3] On that holding, the count in the circuit courts is 1-0, because the Ninth Circuit is the first and only circuit court to decide the issue of whether a government can recover under RICO for providing government services.

Petitioner wrongly contends that the Ninth Circuit's decision "conflicts with the Seventh and Eighth Circuits' conclusions" in a trio of cases that are more than two decades old. Pet. 5 (claiming a split with *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1981); *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983); and *Illinois Dep't. of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985)). Although each of these cases rejects the notion that a RICO injury must be a competitive injury (a proposition with which the Ninth Circuit below did not disagree), none of these cases involve recovery for a RICO injury predicated upon the provision of government services.

The Eighth Circuit's decision in *Bennett v. Berg* involves neither a claim by a government nor a claim to recover for the

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[3] The Ninth Circuit rejected petitioner's suggestion, noting that "Contrary to the County's argument, in holding that the costs of their law enforcement and public health care services are not recoverable damages under civil RICO, we are *not* inserting an additional injury requirement into § 1964(c)." Pet. App. 34a (emphasis added).

provision of government services. 685 F.2d at 1056. That case instead was brought by residents of a retirement community. *Id.* Those residents claimed to have been deprived of the value of their community occupancy agreements as a result of the defendants' fraud. *Id.* at 1058. The question presented here regarding RICO standing to recover for providing government services simply was not at issue in that case.

Likewise, the Seventh Circuit's decision in *Schacht v. Brown* did not involve government services. That case involved a suit by an insurance commissioner acting in his capacity as "the statutory liquidator" of a failed insurance company. 711 F.2d at 1344. *See also id.* at 1346 n.3 ("the Director [of Insurance] may pursue no action which could not have been asserted directly by [the insurer] before liquidation"). The *Schacht* plaintiff's theory of injury was that the defendants drove the insurer "deeper into insolvency." *Id.* at 1345. Accordingly, the commissioner brought causes of action that belonged to the company for wrongs against the company—not claims by a municipality for government services it provided.

The other Seventh Circuit decision, *Illinois Department of Revenue v. Phillips*, also did not involve an injury relating to the provision of government services. 771 F.2d at 312-13. Instead, this case dealt with a tax fraud scheme that deprived the State of sales tax revenues. *Id.* Whether a scheme to avoid taxes causes a government injury to its business or property is an entirely distinct question from whether a government suffers such an injury when it decides to provide municipal services. The fraudulent avoidance of taxes due, like the theft of an account receivable, may (or may not) be deemed an injury to property under RICO. But that issue is subject to an analysis distinct from the issue presented by this petition, which involves the provision of government services. For example, standing for tax fraud may turn upon the purely monetary nature of the loss, the fact that a

government is legally entitled to the money, or the fact that the fraud involuntarily deprived the government of the money. None of these issues, however, are involved in the question of whether a government opting to provide particular municipal services is injured in its business or property under RICO.[4]

For similar reasons, the Second Circuit is not implicated in the alleged conflict. Petitioner argues that the Second Circuit is aligned with the Ninth Circuit because the Second Circuit imposed an antitrust injury requirement in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). Pet. 9. In that case, a municipality also sought to recover the costs of providing government services, including increased police services. 915 F.2d at 103. The Second Circuit first held that the plaintiff failed to allege any RICO predicate acts. *Id.* at 102-03. The court then went on to note that the "[i]njuries of the sort asserted by the Town do not fall within the ambit of section 1964(c)." *Id.* at 104. The Second Circuit, however, has noted that this latter pronouncement was mere dicta. *See Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 132 n.40 (2d Cir. 2001). In fact, the Second Circuit recently reiterated that dicta interpretation and held that a government could sue under RICO for lost tax revenue. *See City of New York v. Smokes-Spirits.com, Inc.*, No. 06-1665-cv(L), 2008 WL 4058373, at *11 (2d Cir. Sept. 2, 2008). Like the Seventh Circuit's decision in *Illinois Department of Revenue*, however, the question of tax revenues due presents a separate issue from the provision of government services.

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[4] In fact, the Seventh Circuit's general approach to RICO standing is similar to that of the Ninth Circuit's reasoning below. *See Doe*, 958 F.2d at 767-68 (analyzing state common law to determine whether civil RICO plaintiff had been injured in her business or property).

That two circuits agree that tax revenue deprivation is an injury to business or property does not create a split with the Ninth Circuit's decision below that the provision of government services is not. The Ninth Circuit remains the only circuit to have addressed the issue of a municipality's standing to recover for the provision of governmental services.

II. PETITIONER'S ALLEGED INJURIES ARE NOT DIRECT.

Petitioner has alleged one of the most far-flung causation theories imaginable. It claims (with no factual detail) that each of the corporate respondents separately conspired with a "labor contractor" to hire illegal aliens. Pet. App. 75a-76a, 80a. Petitioner then leaps to the conclusion that the employment of those workers caused the county to have to arrest them for crimes unrelated to their employment and provide them with medical care for illnesses unrelated to their employment. Petitioner's theory of causation is anything but proximate or direct, as RICO requires.

A. The Ninth Circuit Correctly Applied This Court's Precedents.

Under RICO's civil damages provision, a plaintiff must demonstrate that it was injured in its business or property "by reason of a violation of section 1962," which is RICO's substantive offense provision. 18 U.S.C. § 1964(c). As this Court has repeatedly explained, to satisfy the "by reason of" requirement, a civil RICO plaintiff must demonstrate more than a "but-for" relationship between an alleged RICO violation and an injury to its business or property. A plaintiff also must show proximate causation—"some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. *See also Bridge*, 128 S. Ct. at 2142 (explaining that a finding of proximate causation for RICO claims requires that a "particular emphasis" be

placed on the "demand" for a direct relation between the asserted injury and the alleged RICO violation).

This Court further explained civil RICO's causation requirements in its recent decision in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). In *Anza*, plaintiff Ideal Steel Supply Corp. ("Ideal") brought a RICO action against its competitor and its owner-operators, alleging that they unlawfully failed to pay state sales tax, thereby undercutting plaintiff's prices by not charging sales tax to customers who paid in cash. *Id.* at 454. This Court concluded that Ideal's injuries were not proximately caused because "[t]he cause of Ideal's asserted harms ... is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458. This Court emphasized that the "central question" in assessing proximate causation under RICO is "whether the alleged violation *led directly to the plaintiff's injuries*." *Id.* at 461 (emphasis added).

The *Anza* Court explained the rationales underlying the direct injury requirement. First, the direct injury requirement avoids the "difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.* at 458-59. Under such circumstances, causation would always be uncertain. *See id.* at 459 (reasoning that "the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere" and defendant "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud"). Second, insistence on a direct injury minimizes "the speculative nature" of the proceedings needed to assess damages. *Id.* As this Court explained, "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices." *Id.* In short, the direct injury requirement prevents "intricate, uncertain inquiries from overrunning RICO litigation." *Id.* at 460.

Below, the Ninth Circuit faithfully applied this Court's *Anza* decision and concluded that proximate cause did not exist. The Ninth Circuit concluded that a direct injury was absent because "just as in *Anza*, the cause of the plaintiff's asserted harms is a set of actions (increased demand by people within Canyon County for public health care and law enforcement services) entirely distinct from the alleged RICO violation (the defendants' knowing hiring of undocumented workers)." Pet. App. 41a.

The Ninth Circuit found support for its conclusion based upon the same factors relied upon by the *Anza* Court. First, it noted "the difficulty of assessing causation" because "the asserted causal chain ... is quite attenuated, and there are numerous other factors that could lead to higher expenditures by the County." *Id.* The court explained that "it is not clear how the companies' hiring of undocumented immigrants would increase demand for health care and law enforcement" and "there are numerous alternative causes that might be the actual source or sources of the County's alleged harm." *Id.* at 41a-42a.

Second, the court explained that "the proceedings required to evaluate the County's injury would be speculative in the extreme, perhaps more so than those discussed in *Anza*." *Id.* at 42a. In addition to calculating the increased demand for government services due to the companies' employment practices, the court would have to "construct the alternative scenario of what would have occurred had the companies employed legally authorized workers, and determine how this might have affected the County's total population, and how these alternative workers might have differed from the undocumented workers in their consumption of County services, if at all." *Id.* at 43a. Ultimately, the Ninth Circuit concluded that "[t]his would be an 'intricate, uncertain' inquiry of the type that the *Anza* Court warned against." *Id.*

B. Petitioner's Arguments Are Misplaced.

Petitioner disputes the Ninth Circuit's application of *Anza* for three different reasons. First, petitioner incorrectly contends that dismissal is only appropriate where the plaintiff suffers a derivative or passed on harm. Pet. 21 (asserting that the "conclusion that *Anza* applies ... 'where the harm to the plaintiff ... *does not flow through any intervening victims*' is flatly wrong" (quoting Pet. App. 44a)). That view may be consistent with this Court's decision in *Holmes v. SIPC*. 503 U.S. at 268 (upholding dismissal of plaintiff's RICO claim as indirect because it "complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts"). But *Anza* makes clear that RICO's proximate cause requirement requires more than a non-derivative injury. As set forth above, the *Anza* plaintiff did not suffer a derivative injury—it alleged that it suffered its own competitive injury that was not passed on to it from a more direct victim. Nonetheless, this Court dismissed its RICO claims. Thus, *Anza* only can be read to stand for the proposition that a non-derivative injury must still be proximate. Petitioner simply misunderstands *Anza*.[5]

Second, petitioner contends that a party has standing to sue under RICO so long as its "Complaint does not indicate a more immediate victim of the RICO violations." Pet. 21.

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[5] Petitioner presented this same mistaken view of *Anza* to the Ninth Circuit, which properly rejected it (Pet. App. 44a):

> We are ... unpersuaded by the County's attempt to distinguish *Anza* as a "derivative or passed-on" injury case. It is true that the Court in *Holmes* dealt with derivative injury, in the sense that any harm to the plaintiff occurred only to the extent that a direct victim's injuries were "passed on," or flowed through another victim. But there was no such "passed on" harm in *Anza*: the plaintiff alleged that it lost business due to the defendant's lowered prices, a harm which was distinct from and not contingent on the harm suffered by the state due to the defendant's sales tax fraud.

Petitioner simply wishes to read the *proximate* cause requirement out of RICO. On petitioner's view, no matter how remote the alleged harm may be, a remotely injured party has standing under RICO so long as no other party suffers a "more immediate" injury. The Ninth Circuit properly rejected this view, explaining that it "need not inquire into the question of whether there are more immediate victims of the defendants' alleged RICO violations who are likely to sue" where the asserted injury is remote and would spawn the speculative, uncertain proceedings that *Anza* held were inappropriate. Pet. App. 42a-43a.[6] The Ninth Circuit's interpretation of *Anza* in this respect is consistent with the common law of proximate causation, which does not award damages to the least remotely-injured party. Indeed, petitioner cites no case where a circuit court holds that a remote injury at the end of an attenuated causation chain satisfies proximate cause simply because the injury was less remote than the injuries of other parties.[7]

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[6] Petitioner maintains that the Ninth Circuit's application of *Anza* "conflicts with the proximate causation analysis law of every other Circuit." Pet. 19. Petitioner, however, cites primarily pre-*Anza* cases. See *id.* at 20 n.21. The one case decided after *Anza*—*Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006)—did not hold that the most directly (or least indirectly) injured party always satisfies proximate causation. Instead, *Williams* held only that proximate causation was met after a review of all of the factors discussed in *Anza*. *Id.* at 1287-88.

[7] In the wake of *Anza* a number of courts have held it appropriate to dismiss RICO claims for lack of a direct relationship between the injury and the alleged violation, without conducting an analysis of whether the plaintiff was the most direct victim. *See, e.g., Sanchez v. Triple-S Mgmt. Corp.*, 492 F.3d 1, 13-14 (1st Cir.) (dismissing plaintiffs' RICO claim for lack of proximate causation because plaintiffs failed to show "a direct injury as a result of [the predicate act]"), *cert. denied*, 128 S. Ct. 806 (2007). In *Bridge v. Phoenix Bond & Indemnity Co.*, this Court recently reaffirmed the need to assess at the pleading stage whether the complaint alleges "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury." 128 S. Ct. 2131, 2144 (2008).

Third, petitioner claims that it may recover because the common law of respondeat superior imposes liability on employers for the acts of their employees. Pet. 21-24. Petitioner misses the point. None of the legal principles cited by petitioner stands for the proposition that a plaintiff suing on a respondeat superior theory need not satisfy the demands of proximate causation. Even if they did, such common law cause of action requirements are no substitute for the statutory requirements in RICO.[8]

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[8] Petitioner incorrectly claims its attenuated causal chain is consistent with state common law theories of employer liability. Pet. 21-24. Even if those theories were relevant, the authorities cited by petitioner are inapposite because they support liability where the injury caused is related to employment. *See Cullen v. BMW of N. Am., Inc.*, 691 F.2d 1097, 1098 (2d Cir. 1982) (holding that automobile distributor did not negligently supervise dealership owner who allegedly stole plaintiff customer's car payments); *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 753 (Fla. Dist. Ct. App. 1991) (upholding liability of furniture company for negligently hiring deliveryman who assaulted a customer); Restatement (3d) of Agency § 7.05 cmt. c, illus. 5 ("Liability ... requires some nexus or causal connection between the principal's negligence in selecting or controlling an actor, the actor's employment or work and the harm suffered by the third party"); Restatement (2d) of Torts § 302(B) cmt. e, illus. 6 (noting that employer who hires employee knowing of his violent temperament will be liable to a third party injured only if the employer "brought [the two] into contact or association"); *id.* § 307 cmt. a, illus. 2 (explaining that employer who knowingly hires incompetent employee will be liable to a third party injured because of employee's poor workmanship); *id.* § 317 (noting that employer will generally be liable to a third party injured by employee if the injury occurs while the employee "is upon the premises in possession of the [employer]"); *id.* § 449 cmt. b, illus. 3 (stating that an employer will be liable for injuries caused by employees whom the employer knows are conducting themselves on the job in a manner likely to cause injury).

III. ADDITIONAL GROUNDS FOR AFFIRMANCE COUNSEL AGAINST REVIEW.

For the reasons set forth above, the two alternative grounds for dismissal set forth by the Ninth Circuit are simply not worthy of review judged on their own merits. In any event, the flawed nature of petitioner's enterprise and substantive RICO allegations provide additional grounds for affirmance of the judgment below and further counsel against review in this case.

A. Petitioner's Enterprise Allegations Are Flawed.

Petitioner has vaguely alleged four association-in-fact enterprises. Each enterprise consists of an association-in-fact between one of the respondent corporations and a local labor contractor. Pet. App. 75a-77a, 80a-82a.

Under the plain meaning of RICO's enterprise definition, however, a corporation cannot be a member of an association-in-fact enterprise. RICO defines an association-in-fact enterprise as a "group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). The language and structure of the statute make plain that a corporation is not an *individual*.

In ordinary usage, the term "individual" refers to natural persons rather than legal entities. The noun "individual" means "a single human being as contrasted with a social group or institution." *Webster's 3d New Internat'l. Dict.* 1152 (3d ed. 1969). The limitation of the term "individual" to natural persons is supported by the framework of § 1961 itself. The first clause of § 1961(4) includes both "any individual" and "corporation" as legal persons that may constitute a RICO enterprise. Had the term "individual" included within its scope "corporation," the inclusion of the latter term in that clause would be redundant.

Because the plain language of § 1961(4) does not include an association-in-fact enterprise with corporate members,

petitioner's enterprise allegations are insufficient and provide yet another reason why review in this case is unwarranted.[9]

B. No Substantive RICO Offense Is Alleged.

Petitioner's complaint also fails because it does not plead violations of the alleged substantive RICO offense, 18 U.S.C. § 1962. That provision provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs."

This Court has explained that a RICO defendant must be distinct from the enterprise whose affairs the defendant conducts. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). To state a violation of § 1962(c), a plaintiff must demonstrate "the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Id.* Here, petitioner alleges that the respondent corporations have entered into association-in-fact enterprises with recruiting agents to recruit illegal immigrant workers. A corporation's use of third-party agents to perform tasks such as obtaining workers, however, does not create a separate enterprise. Corporations can only function through the employees, agents, and third parties who work on their behalf. An "enterprise" of a defendant corporation and agents acting on

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[9] A more fulsome presentation of the arguments in support of this interpretation of RICO's enterprise definition (and of the other arguments in Section III of this brief) are set forth in petitioner's briefs in *Mohawk Indus., Inc. v. Williams*, No. 05-465 (2005). In fact, the United States conceded in that case that a corporation was not an "individual" within the meaning of RICO's enterprise definition. See Br. for United States at 6, *Mohawk Indus.*, No. 05-465 (Mar. 16, 2006) ("a corporation is not an 'individual' within the meaning of section 1961(4)"). This Court, however, did not reach the enterprise issue and instead remanded that case for further consideration in light of *Anza*. See Order, *Mohawk Indus.*, No. 05-465 (June 5, 2006).

its behalf "is in reality no more than the defendant itself." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994).[10]

Additionally, petitioner must demonstrate that the respondent corporations "conducted or participated in the conduct of the *enterprise's* affairs, not just their *own* affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (internal quotation marks omitted). Yet the only racketeering activity that petitioner alleges is the respondent corporations' employment of their own workers. Such employment, however, is not the conduct of an enterprise—it is only the conduct of the corporations themselves. *See Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (Easterbrook, J.) (rejecting virtually identical enterprise allegations, explaining that the allegations established only that the defendant "operate[d] *itself* unlawfully" by "supposedly hir[ing], harbor[ing], and pay[ing] the unlawful workers, for the purpose of reducing its payroll"). Petitioner in this case has only alleged facts indicating that the respondent corporations operated *themselves* unlawfully by employing illegal aliens.

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[10] *See also, e.g., Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (defendant corporation cannot form distinct RICO enterprise with its "agents [and] affiliates"); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991) (defendant corporation and advertising agencies working on its behalf do not form distinct RICO enterprise), *overruled on other grounds by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

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